Date: June 27, 1995
Case No.: 94-STA-00005

In the Matter of:

BOBBY J. WILLIAMS,
Complainant

v.

CMS TRANSPORTATIONS SERVICES, INC.,
ILC LEASING, INC.,
Respondents

APPEARANCES:

Kenneth G. Hawley, Esq.
For the Complainant

Peter A. Burr, Esq.
For the Respondent

BEFORE:

RICHARD E. HUDDLESTON
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

The above action arises under the provisions of the Surface Transportation Assistance Act of 1982, 49 U.S.C. § 2301, *et seq*. (hereafter STAA). This action was commenced upon a complaint filed by the Complainant, Bobby J. Williams, with the Secretary of Labor, alleging that the Respondent, CMS Transportation Services, Inc., discriminatorily disciplined and fired the Complainant for refusing to violate Department of Transportation (D.O.T.) regulations, and complaining to the Respondent about dispatches that were in violation of those regulations.

Procedural History:

On September 16, 1993, a preliminary finding and order was issued by Karen L. Mann, Deputy Regional Administrator, U.S. Department of Labor, Occupational Safety and Health Administration ("Administrator"), which was not favorable to the Complainant. The Complainant requested a formal hearing before an Administrative Law Judge for the U.S. Department of Labor on October 12, 1993, and the matter was forwarded to the Office of Administrative Law Judges and assigned to the undersigned.

The Complainant waived the time limits, and the case was continued at the request of Counsel for development of further evidence. Pursuant to notice issued on October 26, 1994, a hearing was held on March 7, and 8, 1995, in Cincinnati, Ohio. Joint motions to submit written closing arguments and extensions of time were granted. The Respondent filed a brief on May 2, 1995, and the Complainant filed a brief on May 3, 1995.

Findings of Fact:

1. The Respondent, CMS Transportation Services, Inc., is engaged in interstate trucking operations and maintains a place of business in Florence, Kentucky. In the regular course of this business, the Respondent's employees operate commercial motor vehicles in interstate commerce to transport cargo.[1]

2. The Respondent, CMS Transportation Services, Inc., is now, and at all times material herein has been, an entity as defined in Section 401(4) of the STAA. 49 U.S.C. § 2301(4).

3. On or about September 15, 1992, CMS Transportation Services, Inc., hired the Complainant, Bobby J. Williams, as a driver of a commercial motor vehicle; to wit, a tractor-trailer with a gross vehicle weight rating in excess of 10,000 pounds.

4. At all times material herein, Bobby J. Williams was an employee in that he was required to drive commercial motor vehicles having a gross vehicle weight rating of 10,000 or more pounds used on the highways in interstate commerce to transport cargo, he was employed by a commercial motor carrier, and in the course of his employment he directly affected commercial motor carrier safety. 49 U.S.C. § 2301(2)(A).

5. On or about June 1, 1993, the Complainant timely filed a complaint with the Secretary of Labor alleging that the Respondents had discriminated against him in violation of § 405 of the STAA. 49 U.S.C. § 2305.

6. The Complainant alleged that he was discharged for complaining about, and refusing to drive on, trips that could not be driven legally within D.O.T. regulations. The Complainant also alleges that the Respondent encouraged its drivers to falsify their log books and to refuse to show them to law enforcement authorities if asked to conceal violation of D.O.T. regulations.

7. The Respondent alleged that the Complainant was discharged for being late on a number of deliveries, being dishonest about where he was located when calling in

[1] Although the case lists two corporations as the Respondents, the parties agree IC is a contractor to CMS, that the Complainant maintains CMS is his employer, that he seeks reinstatement with CMS, and that CMS took the alleged unlawful employment action (Tr. 5-6).

to dispatch, being rude to a Pennsylvania State Trooper, and being an unprofessional driver.

8. The Administrator investigated the above complaint in accordance with § 405(c)(2)(A), and determined that there was reasonable cause to believe that the Respondent had not violated § 405 of the STAA.

9. The Administrator determined that there was no corroborating evidence to support the Complainant's allegations that he complained to management about being forced to drive in violation of D.O.T. regulations, that the evidence supported legal dispatches, and that the Complainant was written up, warned, and terminated because of late deliveries. The Secretary further determined that the Complainant's tardiness on deliveries was due to his starting late, even after having been properly dispatched and warned.

10. The Administrator determined that the termination of the Complainant was not in violation of § 405 of the STAA. 49 U.S.C. 2305.

Testimony of Dan Wilson:

Mr. Wilson testified that he worked as a dispatcher for the Respondent from June 1992 until June 1993 (Tr. 21).[2] He stated that he knew of several instances where the Complainant was disciplined for late deliveries (Tr. 22). Mr. Wilson testified that loads for one-day runs at CMS were normally ready between 11 a.m. and Noon, and two-day runs were ready between 5 and 6 p.m. (Tr. 24). He stated that drivers were required to call in between 8 and 9 a.m. to check in and state if they were going to be late (Tr. 30).[3]

On cross-examination, Mr. Wilson testified that being on time for deliveries is the "bread and butter" of a trucking operation (Tr. 37). He stated that CMS calculates its delivery projections based on an average driving time of 50 mph, but that the allowable speed limit is 55 mph, and 65 mph in many states, so the projections have a built-in leeway for safety checks and coffee and bathroom breaks (Tr. 37-38). He stated that during his time at CMS, the Complainant never said anything to him about illegal dispatches, D.O.T. violations, or loads being late on the dock and causing him to be late for his deliveries (Tr. 40). Mr. Wilson further testified that if the loads were late, the delivery site would be notified that delivery would be late, and it would not be held against the driver (Tr. 40).

Mr. Wilson stated that he made recorded contemporaneous telephone reports from drivers in the regular course of his duties, and had such notes of conversations with the Complainant on

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[2] In this decision, "CX" refers to the Complainant's Exhibits; "EX" refers to the Employer's (Respondent's) Exhibits; and, "Tr." refers to the transcript of the hearing.

[3] To avoid excessive repetition, testimony of the witnesses regarding the four trips the Complainant was disciplined on (Wood Dale, Illinois; Eden Prairie, Minnesota; Carrollton, Texas; and Morris Plains, New Jersey), will be discussed further in the opinion.

September 28, 1992, and November 19, and 23, 1992, regarding late deliveries on the Wood Dale, Eden Prairie, and Carrollton trips (EX 10; Tr. 41-43). He stated that he believed Dale Arnold was present on November 25, 1992, when he told the Complainant upon his return from the Carrollton trip that he would be terminated if he made any more late deliveries (Tr. 44-45).

Mr. Wilson also testified that he never counseled the Complainant to falsify his log entries, and the Complainant never spoke to him about anyone else in the Company advising him to do so (Tr. 47). He stated that he kept an attendance record for all drivers and that this record indicated that the Complainant was in Cincinnati and not dispatched on November 25-29, 1992 (Tr. 47-48).

On redirect examination, Mr. Wilson stated that during the process of interviews, he stressed to each employee the importance of on-time delivery (Tr. 49). He testified that drivers are paid by the mileage based on their trip sheets and not from entries in their log books (Tr. 50). Mr. Wilson explained entries in dispatch sheets such as "13 hours one day," were derived from the "PC Miler" computer program, that he did not put that information on the documents, and that these were pre-set runs in existence when he began employment (Tr. 51-53). He stated that drivers could comply with the schedules because they are estimated at 50 mph, and "they usually push the limit to what - - if it's 65, they'll run to 65" (Tr. 53).

Testimony of Bobby J. Williams:

The Complainant, Bobby J. Williams testified that he started working for the Respondent in September 1992 and was terminated in December 1992 (Tr. 56). He voluntarily left his prior employer of two-and-a-half years, Stevens Trucking, to work for the Respondent because they promised "In and Out" dispatching, which would allow him to be home on the weekends more often (Tr. 59-61). He testified that he normally would be called by the dispatcher, Dan Wilson, before 9 a.m. to receive his assignment, but that in the entire time he worked for CMS, loads were only ready by Noon "maybe once or twice," and there was nothing he could do to speed up the loading process or the paperwork (Tr. 63-66). The Complainant testified that CMS did not provide enough time to complete the trips within the D.O.T. regulations and calculated the mileage straight through, without considering 55 mph speed limits in some states, and the requirement to go around beltways (Tr. 70).

Mr. Williams testified that he complained to Dan Wilson about being dispatched on trips that could not be run legally within D.O.T. regulations on three or four occasions (Tr.71-72). He stated that Tom Schroder, CMS Supervisor of Maintenance, and Dan Wilson told him his trip sheet did not have to match his log book, and that he was paid by the trip sheet (Tr. 72, 74). On one occasion, he received a computer printout indicating his log book was in violation of D.O.T. regulations from Dale Arnold, CMS Director of Operations, but received no subsequent disciplinary action for this violation (Tr. 73, 76). The Complainant testified that he was never told he would be terminated if his log book was inaccurate or if he violated D.O.T. hours of service regulations (Tr. 79-80).

Mr. Williams testified he was never disciplined for anything other than not getting to a destination on time, and was only disciplined by Dan Wilson and Dale Arnold (Tr. 96). He stated

that of the four times he was disciplined for being late, the only time Mr. Arnold and Mr. Wilson spoke to him face-to-face was before the Morris Plains trip, when they told him if he didn't make it on time he would be fired (Tr. 97, 126). The Complainant stated that the last thing he did before he left was to hand the dispatcher his paperwork from the previous trips, so they would know he was there and what time he was leaving the yard (Tr. 95-96). He stated that he never saw any of the disciplinary write-ups or actions during the course of his employment with the Respondent (Tr. 97). The Complainant testified that there is no document that contains the actual miles driven on the trip, such as an odometer reading before he left and when he returned (Tr. 100-101).

The Complainant testified that Tom Schroder, whom he believed to be the Safety Supervisor at CMS, gave him a copy of a document that was on the bulletin board in the driver's lounge stating that he had a right to refuse to let a D.O.T. officer examine his log book, and that he was only required to show the officer that he had the log book and was not required to incriminate himself (CX F; Tr. 128-30). Mr. Williams stated he took a copy of this document with him and that his log book was not current when he left for the Morris Plains trip because he wanted to wait until he got to his destination to falsify the records to make it look as if he was "ready to go" on his return trip to Florence (Tr. 130). He testified that he was speeding to try to make the Morris Plains delivery on time, and that he was stopped in Pennsylvania by a State Trooper, who requested to see his log book (Tr. 131-132). Mr. Williams stated that he refused to turn over his log book, and showed the Officer a copy of the document stating that it was his right under the Fifth Amendment to refuse the request (Tr. 132). He stated that he only showed the Officer the log book upon the threat of being jailed, that the Officer summoned a D.O.T. official, and that he was taken to the nearest rest area and put out of service for eight hours (Tr. 133). Mr. Williams testified that when he returned to CMS in Florence, he was terminated by Dan Wilson, spoke to Dale Arnold briefly, and that the reasons given for his termination were his "being late a couple of times," and "being rude to the DOT man and the State Trooper" (Tr. 133-34). He stated that he made no complaints at this time and "I just cleaned out my truck and left" (Tr. 135).

The Complainant testified that his Exhibit D represented actual departure times from Florence, and was drawn from his log book and roughly cross-checked with the fuel tickets (CX D; Tr. 135). He stated that loads were late in being ready on all the trips he was disciplined on, with the exception of the Carrollton trip, where he exercised his discretion to wait a day or two to rest (Tr. 136). Mr. Williams testified that he earned approximately $350.00 net pay per week at CMS, and would have earned at least $20,000 net pay per year (CX G, H; Tr. 139-41). He stated that he was unable to work from September 1993 until August 1994 because of a back injury and back surgery, but that he was not given a written clearance to return to work by his doctor until November 15, 1994 (Tr. 141-143).

On cross-examination, the Complainant stated that his Exhibit D showed departure times from the Florence, Kentucky, terminal of CMS, but the fuel reports on Exhibit E showed that he was getting fuel in nearby Richwood, Kentucky, many hours later on trips taken October 10, October 13, and October 19, 1992, and he delayed those trips voluntarily without interference from anyone at CMS (Tr. 144-48). He testified that the times on Exhibit D were based on the times from his log book, which he falsified, some of the times do not indicate when he started his

trips, and he could distinguish which entries were false and which ones were true (Tr.148-49). Mr. Williams stated that he falsified his log on October 10, that no one from CMS forced him to do it, and that he voluntarily chose to start his trip at 8 p.m., instead of 8 a.m., when he left the yard (Tr. 150-51). He testified that he falsified the log on October 13, 1992, which no one from CMS forced him to do, and he could have entered the time legally and not been in violation on that day (Tr. 153-55). Mr. Williams stated that he falsified his log book on October 19, 1992, to keep from having a "70 hour" violation, even though he had over 11 hours of driving time available to him on that day (Tr. 155-56). He testified that he falsified his log book to coincide with the time he would cross certain scales, and that his log had a number of falsifications in it because of the "domino effect of lying being at one place when I didn't have time to be there" (Tr. 158). He stated that falsifying log books "to cover up another lie in a log book" is "common practice in the trucking industry, especially when you're being pushed by a dispatcher" (Tr. 159).

Mr. Williams testified that the reason his log book was eight days behind when he was stopped by the Pennsylvania State Trooper on the Morris Plains trip was because it was a holiday weekend, and he wanted to falsify his book to show that he started the week off in Morris Plains (Tr. 160). He stated that he could have legally filled out the log for November 25-29, 1992, but he didn't because he "was doing it all at one time" (Tr. 161). The Complainant stated that he worked "under the table subcontract hauling" in December 1991 for a man from Mason, Ohio, who was "running illegal and running faulty equipment," but that he forgot to include this history on his employment application with CMS that he filled out on January 15, 1992 (EX 14; Tr. 166-68). Mr. Williams testified that he has a felony conviction for possession of cocaine, which he disclosed to CMS on his Background Information Release signed on August 13, 1992 (Tr. 170). He stated that he did not remember getting a company handbook such as Exhibit 15, but he did get a book with names of CMS personnel in it, and he used the numbers in it to call Dan Wilson and Dale Arnold at home one evening (Tr. 171-73).

The Complainant stated that he assumed Tom Schroder was the Safety Director, but he did not know that for sure, and never knew who Dale Arnold was until the end (Tr. 172). Mr. Williams testified that he had no idea who was in charge of the log books, that he turned them in with his paperwork to "one of the ladies in the office," and he never asked who was in charge of log books (Tr. 172-73). Mr. Williams testified he averaged 3,000 miles a week as a professional driver (Tr. 192). He stated that he understood he was not a contract employee, and he was not aware that CMS owed him several warnings before he could be terminated (Tr. 213-14). Mr. Williams testified that in the trucking industry, being on time was important, but that being truthful about where you are or when you leave is not important (Tr. 214). He stated that he did not ask for any time off for personal problems, and the time he had off from November 25-29, 1992, was for the Thanksgiving holidays (Tr. 215-16). Mr. Williams testified that Dale Arnold was not present at the November 25, 1992, meeting, where Dan Wilson told him one more late delivery and he would be fired, but Mr. Arnold was present with Dan Wilson when the Complainant was threatened with termination immediately prior to the Morris Plains trip on November 30, 1992 (Tr. 211, 215).

Mr. Williams testified that he has not worked since he was terminated from CMS, and that he believes the reason he has not been able to find work is because of a "DAC report" that CMS sent in on him, although no such report appears in the record (Tr. 220-22). He stated that he had

back surgery in September 1993, he was able to work in August 1994, and he was not given written clearance until November 1994 (CX H; Tr. 223).

On redirect examination, Mr. Williams testified that he was not late making deliveries on the October 10, 13, and 19, 1992, trips where he voluntarily left late (Tr. 223-24). He stated that he did not delay the trip to Morris Plains in any way, left immediately when the load was ready around 2-2:30 p.m., and "did everything possible to get there on time" (Tr. 224-25). He stated that even if the load was ready at Noon he couldn't have made the trip legally, and that he was told by Dale Arnold and Dan Wilson if the load wasn't there by 8 a.m. he would be fired (Tr. 225-26). The Complainant testified that he did not do any work, including updating his log book, while he was off for the Thanksgiving holidays, and that it is better to be caught with a blank log book than an illegal entry (Tr. 227). Mr. Williams stated that his prior employers would have paperwork with "a print-out saying the time and date that you left or the time and date the load was completed" (Tr. 229). He stated that he had been pulled over for D.O.T. inspections three times in 1992, and that the D.O.T. inspector will use the fuel bills, toll tickets, or anything with a time on it to check for violations in the log book, and that CMS had no policy with respect to time-stamping or printing out actual dispatch times (Tr. 229-231). Mr. Williams testified that "about three-quarters of the loads" he was dispatched on by CMS required him to violate speed limits or D.O.T. time-in-service rules, and such requirements by the other companies he worked for were "far, few and in between" (Tr. 232-33). He stated the reason he did not file a complaint against the other companies he worked for was because they allowed drivers to refuse a load, where if you refused a load at CMS "you may not get another load for a couple of days," and because of the "time factor of delivering and turning around and coming back . . . [b]eing wore out and tired, it was the biggest problem" (Tr. 233-34). He testified that he always had to falsify his logs on a regular basis to keep from having a 70-hour recap rule violation, and that he was usually running in the maximum allowable ceiling for hours (Tr. 235-237).

On recross-examination, Mr. Williams testified that where his log under line "C" stated 68½ hours, he only had 1½ hours left that he could drive in that eight-day period (Tr. 238). He stated that where the log indicates "Total Hours available tomorrow," he could only drive that amount if he took 24 hours off to "have a zero in there to allow for ten days to accumulate another ten hours to start your recap again," and "[e]very eight days, you've got to have a zero in there in order to accumulate any time on your 70-hour recap" (Tr. 239). Mr. Williams testified that he complained to Dan Wilson three or four times about being forced to run illegal dispatches, complained to Dale Arnold at least once, and complained to Tom Schroder three or four times (Tr. 240). He stated that CMS retaliated against him for making complaints by making him wait in Kennesaw, Georgia, "all week long" for a return load, and only giving him 900 miles that week, and towards the end he wasn't getting the mileage because of his complaints (Tr. 242-43). He stated that he was aware that D.O.T. regulations require a driver to keep current on his log book even on holidays (Tr. 243-44).

Testimony of Dale Arnold:

Dale Robert Arnold testified that he has been the Director of Operations for CMS Transportation since 1991, and his duties are to oversee the entire operation, including any personnel decisions (Tr. 256-57). He stated that he has taken D.O.T.-certified courses in the area of regulation compliance (Tr. 258). He explained how the 70-hour rule is calculated, that if a driver didn't max out at 10 hours a day he could drive eight consecutive days without a violation, and that the Complainant's testimony and log book indicated he was not interpreting the 70-hour rule correctly (EX 7; Tr. 259-265). Mr. Arnold stated that he and Dan Wilson made the decision to terminate the Complainant because he was dishonest and undependable, and his termination was triggered by the events on the Carrollton and Morris Plains trips (Tr. 265).

Mr. Arnold testified that he has never counseled drivers to keep inaccurate logs and not to match their trip sheets with their log books (Tr. 266). He stated that the Complainant never came to him and complained about being forced to make illegal runs (Tr. 266). He explained that it is company policy to have the drivers call in between 8 and 10 a.m., to get their dispatches if they are home, and to notify the company of their whereabouts when they are on the road, to help determine if deliveries are going to be made on time (Tr. 267).

Mr. Arnold testified that Dan Wilson wanted to terminate the Complainant when he returned from the Carrollton trip on November 25, 1992, which would have been the normal practice, but instead they gave him some days off for personal problems that he requested because "it's a man's livelihood, so you don't try to cut throat right at the first part, so we gave him another chance" (Tr. 288). He testified that they informed the Complainant "we couldn't have it. This leaving late and being dishonest," and that this was his last chance (Tr. 288).

Concerning the "Fifth Amendment" document, Mr. Arnold testified that the document was put on a company bulletin board by a person or persons unknown, without authorization, it is not a reflection of company policy, and that he has personally removed it from the bulletin board twice; once two weeks before the Morris Plains incident, and once immediately after (CX F; Tr. 293-95).

Mr. Arnold stated that Tom Schroder was a Maintenance Supervisor at CMS, who oversaw vehicle maintenance, and had no responsibility for training and informing drivers in the area of D.O.T. compliance, or whether or not to surrender log books (Tr. 294-95). Mr. Arnold testified that the Complainant never made any complaints about being forced to violate D.O.T. regulations or being sent on illegal dispatches when he returned from the Carrollton trip, or on the day he was terminated after the Morris Plains trip (Tr. 295). He stated that the Complainant never mentioned it was impossible to make the Morris Plains trip legally (Tr. 296). Mr. Arnold identified Exhibit 4 as the attendance sheet for the Complainant, and identified Exhibit 6 as bills of lading for the Wood Dale, Eden Prairie, Carrollton, and Morris Plains trips (Tr. 296-97).

Mr. Arnold testified that he took a call from a motorist in Lafayette, Indiana, on October 29, 1992, who called to complain that a truck being driven by the Complainant "was driving about 75 miles an hour weaving in and out of traffic and was flipping people off who got in his way" (EX 9; Tr. 298-99). He stated that he spoke to the Complainant about the incident on

November 3, 1992, and that the Complainant admitted it happened and said he wouldn't let it happen again (Tr. 299). Mr. Arnold stated that he received a call on November 6, 1992, from a motorist in Baltimore, Maryland, who reported that a truck being driven by the Complainant "was driving fast and weaving in and out of traffic on the Baltimore Beltway and was driving unsafe" (EX 9; Tr. 299). He testified that he and Dan Wilson spoke to the Complainant in the office on November 25, 1992, and advised him that any late deliveries would result in his termination (EX 9; Tr. 300).

Mr. Arnold identified Exhibit 11 as the traffic citation the Complainant received from the State Trooper in Pennsylvania, identified Exhibit 13 as invoices, bills of lading, and other paperwork related to other loads that the Complainant ran while employed at CMS, and identified Exhibit 14 as the Complainant's personnel file (EX 11, 13, 14; Tr. 300). He testified that Exhibit 15 is the CMS Driver Handbook for 1992, which contains emergency and dispatch phone numbers, and that each driver was given a copy of this handbook (EX 15; Tr. 301).[4] He testified that as of June 1994, every load of CMS contains a controlled substance, and because the Complainant has a conviction for a drug offense, he could not be currently employed with CMS (Tr. 302-03).

On cross-examination, Mr. Arnold testified that the only notation for a dispatch time on any of the documents of record is the "12:10" handwritten notation on the invoice for the Eden Prairie trip (Tr. 305). He stated that the only time the Complainant got a load that wasn't ready to go on time was the Eden Prairie trip (Tr. 306). Mr. Arnold testified that he is not personally present on the loading dock and is not personally involved in preparing the paperwork for every load, and that there is no record that indicates at what time the loads were ready to go, but that if it was late it would be noted on the documents (Tr. 306-07). He stated that drivers are paid from their trip sheets not their log books (Tr. 309). He stated that the Complainant was not disciplined for having an inaccurate log book because he wasn't employed long enough to have his log reviewed (Tr. 312).

Concerning the "Fifth Amendment" document, Mr. Arnold conceded that the document was posted on the company bulletin board in the driver's room, but he was not present when Mr. Schroder gave a copy to the Complainant, and he has no personal knowledge of how he got his copy (CX F; Tr. 332-33). He stated that he was given a road test by Mr. Schroder after he was hired, he performed satisfactorily, and that Mr. Schroder did examine him on "company rules for the truck and maintenance aspects," but not company policies (CX I; Tr. 336-37).

On redirect examination, Mr. Arnold testified that he told the Complainant that if he was late again he would be fired on November 25, 1992, but that his Morris Plains run was on November 30, 1992, and he did not speak to the Complainant on that morning (Tr. 339-40). He stated that when a driver feels too fatigued to drive, he should inform dispatch, so another driver could be dispatched on the run, or he would be put on a shorter load, but the Company would not tell the driver to wait until he is ready and make the run illegally (Tr. 340-41).

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[4] EX 16 is a hand-drawn chart showing the route and times of the Complainant's Carrollton trip. EX 17 is a statement of how a professional driver would take the four trips the Complainant was late on. An objection to this Exhibit for being testimony and not a summary was sustained (Tr. 347-349). EX 3 was not offered (Tr. 345).

Rebuttal:

In rebuttal, Mr. Williams testified that he was told deliveries were due at 8 a.m. and he was never told he could be an hour or so late (Tr. 351-52). He stated that he gets no information from the dispatcher, no one tells drivers the trailers are ready to go, and "you go in the little shack outside the loading dock, . . . and when the bills were ready they would put the bills in those little cubby holes." (Tr. 352-54). He stated that on the four occasions he was disciplined for being late, the trailers were loaded but the bills weren't ready, except for the Carrollton trip (Tr. 354-55). He stated that both Dan Wilson and Dale Arnold told him he would be terminated if he was late again after he returned from the Carrollton trip, and both told him again before the Morris Plains trip (Tr. 361). Mr. Williams testified that nothing would happen if he turned in a log book to CMS with a D.O.T. violation in it, he was never questioned about any discrepancies, and that Tom Schroder told him log books and trip sheets didn't have to match (Tr. 363, 365). He stated that Tom Schroder and Dan Wilson briefed him when he was hired, and told him that if he had trouble to get with Tom (Tr. 366-67). Mr. Williams testified that the load was not ready for Morris Plains when he arrived at 12:30 p.m., and that he hooked up, performed his safety check, and left within 20 minutes of the time it was ready (Tr. 368-69). He stated that it takes anywhere from 45 minutes to an hour for a truck to go through a fuel stop, and the time is stamped when you leave (Tr. 370).

On cross-examination, Mr. Williams conceded that he could have fueled the truck before he hooked up to the trailer, while he was waiting for the loads to be ready (Tr. 371). He stated that he was given a print-out and told that his log books were in violation by CMS (Tr. 272-73). He testified that he did not keep any personal records of when loads were ready to leave the dock (Tr. 273). Mr. Williams testified that he did not know whether the Wood Dale and Carrollton loads were ready on time because they were ready on Friday night for Monday deliveries and he did not pick up either load until Sunday night, and of the four deliveries he was disciplined for, he would only have personal knowledge that the Eden Prairie and Morris Plains loads were late (Tr. 374-75). Mr. Williams stated that his Exhibit D indicated times he left from "either/or" the CMS terminal or the fuel point (EX D; Tr. 376).

In rebuttal, Mr. Arnold testified that CMS received a satisfactory rating after an investigation of compliance by D.O.T. on or about December 9 or 10, 1992 (EX 18; Tr. 380-81).

On cross-examination, Mr. Arnold stated that the D.O.T. investigator found some violations and the Company was ordered to correct those violations (Tr. 381).[5] Mr. Arnold stated that the information he received from D.O.T. did not mention 395 (hours of service), and only mentioned 391 (driver qualifications) (Tr. 385-86). He stated that every load they haul now has some type of controlled substance on it (Tr. 387).

[5] Through this witness, CX J & K were admitted; letters to Mr. Williams from D.O.T. dated December 16, 1992, and May 24, 1994, indicating an investigation of the Respondent was conducted, violation of Parts 391 and 395 of the regulations were found, and action has been taken to eliminate the problem.

CONCLUSIONS OF LAW

Section 2305 provides, in part:

> (a) No person shall discharge, discipline, or in any manner discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because such employee (or any person acting pursuant to a request of the employee) has filed any complaint or instituted or caused to be instituted any proceeding relating to a violation of a commercial motor vehicle safety rule, regulation, standard, or order, or has testified or is about to testify in any such proceeding.
>
> (b) No person shall discharge, discipline, or in any manner discriminate against an employee with respect to the employee's compensation, terms, conditions, or privileges of employment for refusing to operate a vehicle when such operation constitutes a violation of any Federal rules, regulations, standards, or orders applicable to commercial motor vehicle safety or health, or because of the employee's reasonable apprehension of serious injury to himself or the public due to the unsafe condition of such equipment. The unsafe conditions causing the employee's apprehension of injury must be of such nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a bona fide danger of an accident, injury, or serious impairment of health, resulting from the unsafe condition. In order to qualify for protection under this subsection, the employee must have sought from his employer, and have been unable to obtain, correction of the unsafe condition.

49 U.S.C.A. § 2305 (Supp. 1994).

Claims under the STAA are adjudicated pursuant to the standard articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under that framework, the Complainant must initially establish a *prima facie* case of retaliatory discharge, which raises an inference that the protected activity was likely the reason for the adverse action. Once a *prima facie* case is established, the burden of production then shifts to the Respondent to articulate, through the introduction of admissible evidence, a legitimate, nondiscriminatory reason for its employment decision. If the Respondent is successful, the *prima facie* case is rebutted, and the Complainant must then prove, by a preponderance of the evidence, that the legitimate reasons proffered by the Respondent were but a pretext for discrimination. *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987); See also, *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711 (1979)*; Texas Dep't. of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

The Supreme Court has held that in meeting its burden of production, an employer need only articulate a legitimate reason for the adverse action, and that no credibility assessment is appropriate at that time. *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742, 2748 (1993). In proving that the asserted reason is pretextual, the employee must do more than simply show that the proffered reason was not the true reason for the action. Instead, he or

she must prove both that the asserted reason is false (*i.e.* not the true reason for the action), and that discrimination was the real reason for the adverse action. *Id.* at 2752-56. Such a requirement is necessary in that it is the employee who bears the ultimate burden of persuading the trier-of-fact that he or she was the victim of intentional discrimination. *Id.* at 2751; *Burdine*, 450 U.S. at 253.

To establish a *prima facie* case of retaliatory discharge, the Complainant must prove: (1) that he engaged in protected activity under the STAA; (2) that he was the subject of adverse employment action; and, (3) that there was a causal link between his protected activity and the adverse action of his employer. *Moon,* 836 F.2d at 229. The Secretary has taken the position that, in establishing the "causal link" between the protected activity and the adverse action, it is sufficient for the employee to show that the employer was aware of the protected activity at the time it took the adverse action. See *Osborn v. Cavalier Homes*, 89-STA-10 (Sec'y July 17, 1991); *Zessin v. ASAP Express, Inc.*, 92-STA-0033 (Sec'y Jan. 19, 1993).

Protected Activity:

Under subsection (a) of § 2305, protected activity may be the result of complaints or actions with agencies of Federal or State government, or it may be the result of purely internal activities, such as internal complaints to management, relating to a violation of a commercial motor vehicle safety rule, regulation, standard, or order. 49 U.S.C.A. § 2305(a) (Supp. 1994); *Reed v. National Minerals Corp.*, 91-STA-34 (Sec'y July 24, 1992); *Davis v. H.R. Hill, Inc*., 86-STA-18 (Sec'y Mar. 18, 1987).

Mr. Williams alleges that he made three or four internal complaints to Dan Wilson, "at least one" complaint to Dale Arnold, and three or four complaints to Tom Schroder regarding the scheduling and operation of runs in violation of D.O.T. hours of service regulations (Tr. 71-72, 240-241). Both Mr. Wilson and Mr. Arnold testified that the Complainant never made any such complaints to them (Tr. 40, 266). The record contains no written documentation from any source supporting Mr. Williams' allegations that he made complaints, and no supporting testimony of any type from Mr. Schroder.

Mr. Williams additionally alleges that he was encouraged by his supervisors at CMS to falsify his logs to cover violations of D.O.T. regulations (Tr. 72, 74, 78-80, 363, 365). He testified, however, that he regularly falsified his logs, and that on a number of occasions he did so voluntarily without any pressure from anyone at CMS, or could have filled out the log legally but chose not to (Tr. 148-59, 161, 235-37). Mr. Williams also testified that on one occasion he did receive a written notice in the form of a computer print-out from Dale Arnold indicating that his log book contained D.O.T. violations, but that he did not receive a reprimand for it and Mr. Arnold told him "not to worry about it " (Tr. 72-73, 76, 372-73). Both Dan Wilson and Dale Arnold testified that they never encouraged any employee to falsify their logs (Tr. 47, 266). Moreover, Mr. Williams' testimony concerning the "70 Hour Rule," and the corresponding testimony of Mr. Arnold, indicates that the Complainant did not fully understand how to determine his available hours in compliance with that rule (Tr. 238-40, 259-65). The record contains no written documentation from any source encouraging falsification of logs, and no supporting testimony of any type from Mr. Schroder.

Based on the admissions of the Complainant, and the lack of supporting documentary evidence, I find that the Complainant has not established by a preponderance of the evidence that he was engaged in protected activity under subsection (a) of § 2305.

Under subsection (b) of § 2305, an employee engages in protected activity when he or she refuses to operate a commercial motor vehicle where such operation would constitute a violation of a commercial motor vehicle safety or health rule or regulation, including D.O.T. hours of service regulations. *Greathouse v. Greyhound Lines, Inc.*, 92-STA-18 (Sec'y Aug. 31, 1992). In order to qualify for protection under this subsection, an employee must have sought from his employer, and been unable to obtain, correction of the unsafe conditions causing him apprehension of injury to himself or to the public.

Refusal to work because of fatigue or because of hours of service regulations is a protected activity under the STAA. *Polger v. Florida Stage Lines*, 94-STA-46 (Sec'y Apr. 18, 1995); *Brown v. Besco Steel Supply*, 93-STA-30 (Sec'y Jan. 24, 1995). Refusal to violate the speed limits is protected activity under the STAA. *Nolan v. AC Express*, 92-STA-37 (Sec'y Jan. 17, 1995); *McGavok v. Elber, Inc.*, 86-STA-5 (Sec'y July 9, 1986).

There was no evidence produced at the hearing, however, of any refusal to drive on the part of Mr. Williams, and he testified that he regularly violated speed limits and D.O.T. regulations in attempts to make his CMS-mandated delivery times (Tr. 88, 109, 132). The Complainant also testified that immediately prior to leaving on the Morris Plains trip that led to his termination, he complained about being required to violate D.O.T. regulations to make the run, but did not refuse the run, told both Dale Arnold and Dan Wilson that he would "just do the best I can do," and was ticketed for speeding during the run (EX 11; Tr. 98-99, 126-27). Mr. Williams testified that if he refused a run, CMS would retaliate by withholding work from him, but no evidence was presented indicating any refusal or retaliation (Tr. 242-43).

Mr. Williams alleges that he told Dan Wilson he was too tired to make the Carrollton trip when he was dispatched on Friday, November 18, 1992, but that Mr. Wilson told him "I don't care when you leave, just don't be late" (Tr. 122-23). The record, however, contains no written documentation of the allegation, there is no evidence that Mr. Williams refused to make the trip, and his testimony regarding the trip is inconsistent. Mr. Williams initially testified that to make the trip legally and on time, he would have had to leave for the Carrollton trip immediately upon being dispatched on Friday morning, after he had just driven 1,500 miles on an Eden Prarie trip (Tr. 112-13). He later testified that he could have left as late as 3 a.m. on Sunday, November 20, 1992, and made the trip legally and on time with time for all safety checks and two hours for meal breaks (Tr. 210). The fuel report shows that Mr. Williams did not leave until after 6:24 p.m. on Sunday evening, November 22, 1992, when the delivery was due in Carrollton at 8 a.m. (CST) on Monday November 23, 1993 (EX 6, 8). He also testified that being unhappy about working weekends "had a bearing on my decision [of when he left] there too" (Tr. 206). Mr. Wilson did not testify regarding this issue, and Mr. Arnold testified that the procedure when a driver feels he is too fatigued, is to notify dispatch, so another driver can be assigned, but not to start the trip late and run the trip illegally, as the Complainant did (Tr. 328-29).

There is no documentary evidence of record, or testimony from any other witnesses that shows that Mr. Williams sought correction of dispatches in violation of D.O.T. regulations from anyone at CMS. Based on the admissions of the Complainant, and the lack of supporting documentary evidence, I find that the Complainant has not established by a preponderance of the evidence that he was engaged in protected activity under subsection (b) of § 2305.

As Mr. Williams has not shown that he was engaged in a protected activity under the STAA, he has not established an essential element of his *prima facie* case, and his complaint must be dismissed. Even assuming, *arguendo*, that this element of his case has been established, however, his complaint would still fail.

Adverse Employment Action:

As the termination of one's employment certainly constitutes "adverse employment action" and Mr. Williams' employment was terminated, this element of the Complainant's *prima facie* case would be established.

Causal Relationship:

The final element of the Complainant's *prima facie* case is the establishment of a causal link between the protected activity and the adverse employment action. An inference of causation may be raised by proof that CMS had knowledge of Mr. Williams' complaints at the time it engaged in the adverse employment action. By the same token, however, where it is proven that the employer was unaware of the protected activity at the time of the adverse employment action, no *prima facie* case can be made. *Greathouse v. Greyhound Lines, Inc.*, 92-STA-18 (Sec'y Dec. 15, 1992).

Here again, Mr. Williams' alleged complaints about illegal dispatches and being instructed to submit falsified logs to Dan Wilson, Dale Arnold, and Tom Schroder are unsubstantiated by any other documentary or testimonial evidence. As noted previously, both Mr. Wilson and Mr. Arnold denied that any alleged complaints were made, and no testimony or other evidence concerning Mr. Schroder was presented (Tr. 40, 266). I find no reason to discredit their testimony on this point, as there is no documentary evidence that contradicts them, and overall, they were more credible witnesses than Mr. Williams, whose testimony is inconsistent with the fuel report, other documentation, and his own statements on a number of occasions (EX 4, 8).

Mr. Williams has also failed to establish this element of his *prima facie* case.

Grounds for Dismissal:

Assuming, *arguendo*, that Mr. Williams had established a *prima facie* case, the burden would shift to CMS to articulate a legitimate reason for his termination. See *St. Mary's Honor Center*, *supra*. Dale Arnold stated that Mr. Williams was terminated because he was dishonest and undependable, which is sufficient to rebut the presumption that Mr. Williams was the victim of a discriminatory discharge as shown by his *prima facie* case (Tr. 265). *Id*. The burden then

shifts back to the Complainant to establish, by a preponderance of the evidence, that the reasons expressed by Mr. Arnold are a pretext, and he was discharged because of protected activity. *Id.*

Mr. Williams testified that he was terminated because of his complaints regarding dispatches that were in violation of D.O.T. regulations (Tr. 71-72, 240-41). He testified that he was only disciplined for failing to make deliveries on time, and of the four times he was disciplined, the only time Dale Arnold or Dan Wilson physically spoke to him was before the Morris Plains trip when they told him if he was late he would be fired (Tr. 96, 127).

Disciplinary Action:

The Complainant testified that he was only disciplined for being late on deliveries (Tr. 96). Of the four times Mr. Williams was disciplined for being late, he admitted that he had no knowledge whether the Carrollton and Wood Dale runs were loaded on time, because they were normally ready by Friday evening, and he did not pick them up until the following Sunday evening, and that it was his choice to pick the loads up when he did (Tr. 178-81, 374-75). I am troubled by the fact that there is no documentation of when the loads were ready by CMS, with the exception of one handwritten notation indicating the Eden Prarie load wasn't ready until 12:10 p.m. (EX 6). That notation, however, is somewhat supported by the notes from Dan Wilson which show the load being late as one of the reasons for Mr. Williams failing to make the Eden Prairie delivery on time (EX 10). I also note that the Complainant has no personal records showing when the loads were ready, or the distances between the locations he was dispatched to (Tr. 100-101, 273).

The Wood Dale Trip:

The Wood Dale trip was scheduled for seven hours and 312 miles, with a delivery at 8 a.m. (CST) on September 28, 1992 (CX B; EX 6). Mr. Williams testified that he picked up his load between 12:30 and 1 a.m. on September 28, 1992 (Tr. 178). Mr. Williams testified that he allowed himself "plenty of time. It's only six hours max, to Wood Dale . . . ." (Tr. 181). Mr. Williams testified that he delivered the load at 11 a.m. (EST), and did not call dispatch until that time, because he was stuck in rush hour traffic near Chicago (EX 5, 10; Tr. 104). The fuel report shows he bought fuel on September 25, 1992, but not on the day of the delivery, so the truck was already fueled when he picked up his load (EX 8). Mr. Williams' testimony shows that he was aware that Chicago rush hour traffic was something to be avoided, as he stated he had driven through the Chicago area "[p]robably a hundred times," and that "[t]raffic's real bad in Chicago always. "It's worse than L. A." (Tr. 86-87).

Dale Arnold testified that the preferred way to make the trip is to leave on Sunday afternoon or early evening, reach the destination around midnight, avoid the Chicago rush hour traffic, make the delivery in the morning, and have a full number of hours for the return trip (Tr. 268-69). He also testified, however, that CMS did not require him to leave at any particular time, and relied on his "professionalism as a truck driver" to make the decision of when to go (Tr. 269). Mr. Arnold stated that the Complainant was not terminated at that point, and was only counseled by Dan Wilson to "do better job next time," because he had only been with the company nine days (Tr. 270-71, 313).

Based on the above, I find that Mr. Williams was late in making his delivery in Wood Dale by two hours, and that CMS played no role in making him late. Consequently, the Complainant has not proven by a preponderance of the evidence that his being disciplined for being late on the Wood Dale delivery is a pretext to discriminate against him for engaging in protected activity.

The Eden Prairie Trip:

The Eden Prairie trip was run on November 18-19, 1992, and was scheduled for 702 miles and 15 hours, with a delivery time between 8 and 9 a.m. (CST) on November 19, 1992 (CX B, C; EX 6; Tr. 25-27). Mr. Williams testified that the load was ready about 1 p.m., he actually left the Florence area about 3:15 or 3:30 p.m., and arrived in Eden Prairie at 11 a.m. the next day (CX A, B; Tr. 81-82, 85-86, 108-09; 190). He stated that he did not delay the start of the trip, the trip normally takes 17 to 19 hours, is 750 miles, and he couldn't have made it legally by 8 a.m. on the 20th, even if the load was ready at Noon on the 19th (Tr. 85-86, 109). Mr. Williams testified that he violated D.O.T. regulations and speed limits, but was still unable to make the run on time (Tr. 88, 109). Mr . Williams testified that CMS mileage calculations are inaccurate because they don't consider varying speed limits and that trucks are required to go around beltways (Tr. 190-91).

Mr. Arnold testified that the mileage figure was derived from the "PC Miler" computer program which is used by both D.O.T. and the Internal Revenue Service (Tr. 267-68). He stated that the load was normally ready at 11 a.m., drivers are expected to be there at that time, the trip can be completed legally by 9. a.m. Eden Prairie time, the speed limits for trucks in most states the Complainant had to cross (Indiana, Illinois, and Wisconsin) was 60 mph, and no rerouting due to beltways was involved (Tr. 271-73). Mr. Arnold testified that the load for this Eden Prairie trip was not ready until 12:10 p.m., as noted on the bill of lading by Dan Wilson, the Complainant was not present at 11 a.m. as required, still wasn't there at 1:30 p.m., he checked the bills, and that he can see the entire yard and the driver's room from his office (EX 6; Tr. 321-24). Mr. Arnold stated that the drivers are given extra time when the loads are late (Tr. 276, 325-26). Mr. Wilson testified that the trip could not be completed legally by 9 a.m. "according to what we're looking at here [CX B, C]," but did not state if he was taking into account the different time zones, or whether the load was ready at 11 a.m. and not Noon (Tr. 30). Mr. Wilson also testified that if a load is late being ready, a notation will be made on the paperwork (Tr. 31-32).

I give more credit to the testimony of Dale Arnold, because it is consistent with the documentary evidence that the load was late (EX 5, 10). Mr. Williams' testimony regarding when the load was ready is inconsistent, originally stating it was ready at 1 p.m., and then 2-2:30 p.m. (Tr. 81-82, 355). Mr. Williams' testimony about when he arrived is also inconsistent. He agreed with his Counsel's statement that he arrived at 11 a.m., and does not distinguish whether that was EST or CST (Tr. 108). The documentary evidence, however, shows he made the delivery at "1300," which would be 1 p.m. (EST), and he also agreed with his Counsel's incorrect statement that he arrived at "1300 hours, which is 11 a.m." (CX B, C; EX 5, 6; Tr. 108-09). In addition, Mr. Williams' voluntary actions played a significant role in when he was able to make the delivery. The fuel report shows that Mr. Williams did not finish fueling his truck until 3:20 p.m. on the date of the trip, even though Mr. Williams testified that he was free to fuel his truck before he picked up his loads, and the record shows that he had done so on other trips (EX 8; Tr. 370).

Mr. Williams testified that he did not arrive until 12:30 p.m. that day, so by his own testimony, he would not have been present to receive the load whether it was ready at 11 a.m. or 12:10 p.m. (Tr. 355-56). Moreover, the fuel report and the Complainant's own testimony establishes a pattern by Mr. Williams on a number trips of voluntarily choosing to leave several hours past the time when the loads were ready (EX 8; Tr. 223-34).

The only documentary evidence Mr. Williams presented to support his testimony that the load was ready later than 12:10 p.m. was his Exhibit D, a noncontemporaneous summary of times he left "Florence area" (which could be either the CMS Florence terminal or Richwood fuel point), based in part on his log book, which he admits to regularly falsifying (CX D; EX 7; Tr. 119-120, 130, 148-49, 158-61, 376).

Calculating the trip at 702 miles, it could be completed in slightly over 14 hours at an average of 50 mph, and CMS allowed 15 hours (even calculating the trip at the 750 miles as claimed by Mr. Williams, it could be completed in 15 hours) (CX B, C; EX 5, 6). Based on a 15-hour projection, if the load were ready at 11 a.m., and the driver left at that time, he could legally arrive in Eden Prairie at 9 a.m. (CST), which is 10 a.m. (EST). If the driver is not able to leave with the load until Noon, based on a 15-hour projection, the arrival time would be 10 a.m (CST), 11 a.m. (EST). Based on a trip of 702 miles, a 50 mph average would place the driver who left with his load at 11 a.m. in Eden Prairie a few minutes after 8 a.m. (CST), or 9 a.m. (EST). If the driver is not able to leave with the load until Noon, based on a 50 mph average of 702 miles, the arrival time would be a few minutes after 9 a.m. (CST), 10 a.m (EST).

In this case, CMS concedes that the load was not ready until 12:10 p.m. Based on a 15-hour projection, if Mr. Williams left at 12:10 p.m., drove 10 hours until 10:10 p.m., took eight hours off until 6:10 a.m., and drove five hours, he would arrive at 11:10 a.m (EST), which is 10:10 a.m. (CST). Mr. Wilson testified that if the loads were late, the delivery site would be notified, and it would not be held against the driver (Tr. 40). Mr. Arnold testified that the driver would be given additional time if the load was ready late (Tr. 277, 325-26). Mr. Williams, however, did not arrive until Noon CST, or 1 p.m. (EST) (CX B; EX 5; Tr. 108). Even allowing additional time for the load being late, and based on a full 15-hour projection, Mr. Williams was nearly two hours late. In addition, Mr. Wilson's telephone log from 8:50 a.m on November 19, 1992, states that Mr. Williams was additionally delayed because of a doctor's appointment and oversleeping (EX 10). Mr. Williams disputes those entries, but concedes that Mr. Wilson's notes about the Wood Dale trip were accurate, offers no reasons why Mr. Wilson would make them up, and did not question Mr. Wilson about them when Complainant called him as a witness (Tr. 174, 186).

Based on the above, I find that all the credible evidence suggests that Mr. Williams was late for his delivery on the Eden Prairie trip by close to two hours. Consequently, the Complainant has not proven by a preponderance of the evidence that his being disciplined for being late on the Eden Prairie delivery is a pretext to discriminate against him for engaging in protected activity.

The Carrollton Trip:

The Carrollton, Texas, trip was scheduled for 924 miles and 19 hours, with a delivery time of 8 a.m. (CST) on Monday, November 23, 1992 (CX B; C; EX 5, 6). The length of the trip is not disputed and the conflict arises over the circumstances leading up to the trip.

Mr. Williams testified that he could have made this run legally when he was dispatched on Friday, November 20, 1992, but that he was too tired from driving on prior trips, did not have one day where he wasn't driving the prior two weeks, and that he would have had to leave for Texas as soon as he came back from the prior trip (Tr. 112-13, 118). He testified that he told Dan Wilson he was too tired, but that Mr. Wilson's response was "I don't care when you leave, just don't be late" (Tr. 122-23). Mr. Williams left for this trip on Sunday night, November 22, 1992, at 5:45 to 6 p.m. (CX D). He testified that he was late on the delivery by about eight hours, that he called CMS from Texarkana at 12:30 p.m. on Sunday and told them he was two hours away, but he did not make the delivery until 4:15 p.m. because he "couldn't find the place" (Tr. 210-12).

Dan Wilson testified that he received a call from the Complainant at 10:15 a.m. on November 23, 1992, stating that he would be two hours late, and that he did not make the delivery until 4:10 p.m. (EX 10; Tr. 44-45).

Dale Arnold testified that Mr. Williams was dispatched on Friday morning, November 20, 1992, and that the load was due the following Monday, November 23, at 8 a.m. (Tr. 281). Based on the fuel report, Mr. Arnold stated that the Complainant did not leave the Richwood fuel point until 6:22 p.m. on Sunday evening, November 22, 1992 (EX 8; Tr. 284-85). Mr. Arnold also stated that the fuel log showed that Mr. Williams bought fuel in Texarkana at 12:30 p.m. on November 23rd, and estimated that he was actually near Little Rock, Arkansas, when he phoned at 10:15 a.m., which is approximately six hours away from his destination (EX 16; Tr. 286-87). He testified that it was reasonable for the Complainant to be tired at the time of his dispatch, but that he was given at least 24 hours off, and should have notified dispatch if he felt that he could not drive safely, so another driver could have been assigned to the trip (Tr. 328-29). He stated that drivers usually average 2,600-2,800 miles per week, that Mr. Williams was given this trip because he only had 1,500 miles from an Eden Prairie trip that week, and he wanted to give him more miles and subsequently more pay for the week (Tr. 342-43). Mr. Arnold testified that Mr. Williams' log book shows that the week prior to the Carrollton trip, he was home all day Sunday, did a local run to Columbus on Monday, and was off all day Tuesday prior to his Eden Prairie trip (Tr. 342-43). Mr. Arnold testified that upon return, the Complainant initially maintained that he had left for Carrollton at 4 p.m. on Saturday, but when confronted with the fuel report "he confessed and said that the reason he left late, he was having personal problems at home" (Tr. 287).

I give more weight to the testimony of Mr. Arnold because it is consistent with the fuel report and Mr. Williams' attendance records (EX 4, 8). His testimony about why Mr. Williams was dispatched is also consistent with the Complainant's testimony about averaging 3,000 miles per week (Tr. 192). I find that Mr. Williams' account of this trip is not credible and inconsistent with the objective evidence. On cross-examination, he admitted that he could have left as late as

3 a.m. Sunday morning, November 22, 1992, and made the trip legally, including time for all safety checks and two hours for meals (Tr. 210). There is no documentation to support his testimony that he drove every day for two weeks straight prior to this trip, and the attendance calender and his own driver's log indicates that he had a number of days off, even though he admits to falsifying his log during that period (CX A; EX 4, 7; Tr. 119-20). There is no supporting evidence that he told Dan Wilson he was too tired to drive, or that Mr. Wilson told him to make the delivery anyway. The fuel report shows that Mr. Williams was buying fuel at the Richwood, Kentucky, fuel point at 6:24 p.m. on Sunday night, November 22, 1992, when the load was due at 8 a.m. the following morning (EX 8). The fuel report also shows that he bought fuel in Texarkana at 12:32 p.m. (EST) on November 23rd, so he either was not in Texarkana when he reported in at 10:15 a.m., or reported to dispatch at a later time as he stated (EX 8). The fuel report also directly contradicts his testimony that he made a delivery in Fairfield, Ohio, at 9 a.m., and returned to the CMS Florence terminal the previous Friday, November 20, 1992, at 11 a.m., because it registered his purchase of fuel in Beloit, Wisconsin, some 400 miles away, at 6:23 a.m. that same morning (CX E; EX 8; Tr. 199-203). The bills of lading show him exchanging pallets at the Fairfield location at 3 p.m. on Friday, November 20, 1992 (CX C). Mr. Williams has admitted not wanting to work weekends had a part in his decision in starting the trip when he did (Tr. 206). Mr. Williams testified that being truthful about his location when he called in and when he started his trips was not important in the trucking industry (Tr. 214).

Based on the above, I find that all of the credible evidence suggests that Mr. Williams was late for his delivery on the Carrollton trip, and that CMS did not require him to take the trip against his wishes, or encourage him to begin the trip too late to make the delivery legally and on time. Consequently, the Complainant has not proven by a preponderance of the evidence that his being disciplined for being late on the Carrollton delivery is a pretext to discriminate against him for engaging in protected activity.

The Morris Plains Trip:

The Morris Plains, New Jersey, trip was scheduled for 625 miles and 13 hours, with a delivery of 8 a.m. on December 1, 1992 (CX B; EX 5, 6). The Complainant testified that the Morris Plains trip normally takes 16 hours, and that even if the load is ready at Noon, the trip cannot be completed legally by 8 a.m. the following day (Tr. 91). Mr. Williams testified that the load was ready between 1:45 and 2 p.m. (on November 30, 1992), he left about 2:30 p.m., and he did nothing to delay the start of the trip (Tr. 90-91, 126).

Both Mr. Wilson and Mr. Arnold testified that the trip to Morris Plains could not be run legally (at an average of 50 mph) and completed by 8 a.m., if the driver left at Noon, as indicated in company documents (EX 5; Tr. 33, 330-32). Mr. Arnold testified that the trip is closer to 640 miles according to the PC Miler, would take close to 13 hours, and could be completed legally by 9 a.m., but not by 8 a.m. (Tr. 329). Mr. Arnold testified that the schedule was tight, and the delivery would not be considered late if it was made by 9 a.m. (Tr. 296). Mr. Wilson stated that he dispatched the Complainant to Morris Plains for a delivery between 8 and 9 a.m., that the load was normally ready between 11 a.m. and Noon, and that if the load wasn't ready the documents should have had some notation (Tr. 30-33). Mr. Arnold testified that no one at CMS did anything to delay Mr. Williams from beginning the trip until 2:30 p.m. (Tr. 293).

Regardless of when the load was ready, Mr. Williams did not complete this delivery at any time because he was stopped for speeding, had no entries for the prior eight days in his log book, and was taken to the nearest rest area by a D.O.T. official and placed off duty for eight hours (Tr. 131-33). This necessitated CMS rerouting another driver to take the load to its destination in Morris Plains (Tr. 293).

Mr. Williams testified that he was encouraged to falsify his log book by CMS, and an inference could be drawn that the detention that caused him to fail to make the delivery was a result of this encouragement. That argument fails because Mr. Williams had no reason to leave the prior eight days in his log book blank. The Complainant had been off work for at least four days before he was dispatched, and he could have filled out his log truthfully and had no fear of being in any type of violation. Moreover, he testified that he was aware of the regulations requiring a driver to keep his log up to date, even over holiday periods (Tr. 243-44).

Mr. Williams was stopped for speeding, and an inference could be drawn that he was forced to speed by CMS because he was not allowed sufficient time to make his delivery at legal speeds. That argument is weak because Mr. Williams took actions that ensured that he could not make the trip legally by not fueling the truck before he picked up the load, or by arriving before 12 to 12:30 p.m. (Tr. 367). Moreover, the "Fifth Amendment" document that Mr. Williams claims was provided by Tom Schroder as a CMS supervisor, was not the reason for his stop or his detention. He was stopped for speeding and taken out of service because he had his log book blank for the prior eight days.

As Mr. Williams did not complete the Morris Plains delivery, clearly he did not deliver it on time. Consequently, I find that the Complainant has not proven by a preponderance of the evidence that his being disciplined on the Morris Plains delivery is a pretext to discriminate against him for engaging in protected activity.

Termination:

Mr. Williams testified that Mr. Wilson told him when he returned from the Carrollton trip, and both Mr. Arnold and Mr. Wilson told him immediately prior to leaving for the Morris Plains trip, that he would be terminated for any more late deliveries (Tr. 98-99, 212, 215). Mr. Williams later testified that Dale Arnold was present on both occasions (Tr. 361). Mr. Williams stated that when he returned to CMS in Florence, he was terminated by Dan Wilson, spoke to Dale Arnold briefly, and that the reasons given for his termination were his "being late a couple of times," and "being rude to the DOT man and the State Trooper" (Tr. 133-34). He stated that he made no complaints at this time and "I just cleaned out my truck and left" (Tr. 135).

Mr. Arnold testified that he and Mr. Wilson had a meeting on November 25, 1992, with the Complainant when he returned from the Carrollton trip, and informed him that any more late deliveries or dishonesty would result in his termination, but that he never spoke to the Complainant immediately prior to the Morris Plains trip on November 30, 1992 (Tr. 339-40). Mr. Wilson testified that he and Mr. Arnold met with the Complainant on November 25, 1992, and told him that the next time he was late would result in his termination, but never testified about any meeting with the Complainant on November 30, 1992 (Tr. 44-45). Both Mr. Wilson

and Mr. Arnold testified that they never received any complaints about illegal dispatches or D.O.T. violations from the Complainant (Tr.40, 266).

Even assuming that Mr. Williams was engaged in protected activity, and that his supervisors at CMS were aware of such activity, if the evidence shows that the employer's adverse action was motivated by both prohibited and legitimate reasons, the dual motive doctrine applies. *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287 (1977); *Pogue v. United States Dept. of Labor*, 940 F.2d 1287 (9th Cir. 1991). In such a case, the employer has the burden to show by a preponderance of the evidence that it would have taken the same action concerning the employee even in the absence of the protected conduct. *Mt. Healthy*, 429 U.S. at 287; *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252 (1989) (plurality opinion); *Mackowiak v. University Nuclear Systems*, 735 F.2d 1159, 1163-64 (9th Cir. 1984).

Mr. Arnold stated that Mr. Williams was terminated because he was unreliable and dishonest (Tr. 265). As discussed above, the fuel report substantiates that Mr. Williams was not honest with his Employer about his locations when he made his required reports to dispatch on a number of occasions, and he testified that he felt being honest on such reports is not important (EX 8; Tr. 214). Even assuming that the Eden Prairie and Morris Plains trips could not be completed as scheduled, the evidence shows that in 2½ months of employment for CMS, Mr. Williams was late on two other deliveries, failed to complete one of his deliveries and required CMS to reroute another driver to finish it for him, regularly and voluntarily falsified his log book, received a company notation informing him his log book was in violation, was ticketed for speeding, was put out of service for eight hours for having his log book blank for the previous eight days, was rude to a police officer and D.O.T. official, was dishonest about where he was when he called in, and was driving in a sufficiently reckless manner to prompt motorists to call and report him to CMS on two separate occasions (CX A, B, C; EX 4, 7, 8, 9, 11).

Mr. Arnold also testified that the Complainant's termination was triggered by the Carrollton and Morris Plains trips (Tr. 265). As discussed above, Mr. Williams' version of the Carrollton trip is inconsistent with the documentary evidence which shows he could have made the trip legally when dispatched, he voluntarily began the trip late, did not accurately disclose his whereabouts when reporting to dispatch, and was over eight hours late in making the delivery. I have also determined that Mr. Williams' own actions played a significant role in keeping him from completing the Morris Plains delivery. Even though his supervisors had threatened him with termination for any late deliveries on November 25th, and the loads were supposed to be ready between 11 a.m. and Noon, Mr. Williams testified that he arrived at the CMS terminal around 12:30 p.m. on November 30th (Tr. 367). Even upon threat of termination, Mr. Williams was not present to receive the load at the time CMS told him it would be ready. Mr. Williams testified that it takes between 45 minutes to an hour to fuel the truck, and that he could have fueled the truck before he received the load, and the fuel report shows that he had done so on prior occasions (EX 8; Tr. 370-371). Yet even on threat of termination, Mr. Williams did not fuel the truck until after he picked up the load, and did not finish fueling until 2:37 p.m. on November 30th (EX 8). Finally, Mr. Williams never

made the delivery at all, because he was stopped for speeding, and placed out of service for eight hours because he had no entries for the prior eight days in his log book, actions within the dircct control of Mr. Williams.

Even assuming that the Complainant was engaged in protected activity, the Employer has shown by the overwhelming weight of the evidence that it had legitimate reasons for terminating Mr. Williams, which were not a pretext for engaging in retaliatory discrimination.

In evaluating the entire record, I conclude that the Complainant has not shown by a preponderance of the evidence that he engaged in protected activity, and even if he had engaged in protected activity, the Employer terminated him for legitimate nondiscriminatory reasons.

Clean Hands:

I have found that Mr. Williams has not proven by a preponderance of the evidence that he was engaged in a protected activity**,** and that even if he were engaged in such an activity, CMS terminated him for legitimate reasons. I write additionally, however, to acknowledge that I do not believe that CMS has entirely "clean hands" in this case. Both Mr. Arnold and Mr. Williams admitted that CMS documents showed the Morris Plains trip could not be completed legally. There was no time stamping of when loads were ready, so it is more difficult to determine whether drivers were pushed to run the loads in violation of D.O.T. regulations. I note also that D.O.T. investigators, in response to complaints from Mr. Williams, did find some violations at CMS, although the record is unclear as to the specific violations and the severity of such, and CMS did receive a satisfactory rating at the conclusion of the D.O.T. investigation (CX J, K; EX 18).

The purpose of the STAA is to promote public safety on the Nation's highways by protecting those who report safety violations or refuse to operate in a manner countrary to D.O.T. safety regulations from adverse action by their employers. It is quite disconcerting to hear witnesses such as the Complainant testify that falsifying log books and violating D.O.T. hours of service regulations are a common practice in the trucking industry. Drivers are paid by the estimated mileage on the trip sheets and not by their driver's log, so there is naturally more emphasis on the part of the drivers to cover the mileage as quickly as possible, and thus, more incentive to "doctor" log books. Consequently, there is less incentive to promote safety by driving within speed limits and according to D.O.T. regulations. It seems that D.O.T. safety regulations would be promoted more effectively if drivers were paid by their log books, and their adherence to D.O.T. hours of service regulations.

I additionally note that the Complainant also fails to recognize the intent of the STAA. The STAA is not a tool for drivers who have been legitimately disciplined or terminated to selectively retaliate against their employers. The Complainant here testified that all of his many previous employers violated D.O.T. regulations, but that he did not file a complaint against them, and only chose to file a complaint against the Respondent, because the Respondent's violations were more regular and consistent. More importantly, the Complainant

never refused to engage in any unsafe activity, and instead admits to regularly violating both D.O.T. hours of service regulations and speed limits to make his deliveries; driving reckless enough to prompt motorists to report his unsafe operation to his Employer on two separate occasions.

RECOMMENDED ORDER

I recommend that the Complaint of Bobby J. Williams against the Respondents be dismissed.

Entered this the _____ day of July, 2002, at Cincinnati, Ohio.

_____
Richard E. Huddleston
Administrative Law Judge